Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALBERT JOHNSON, PETITIONER

v.

MICHAEL SHEAHAN, JAMES FAIRMAN, AND RAUL ESTRADA, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The First, Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have held that prisoners have a constitutionally cognizable interest in not being routinely and deliberately monitored while undressed, showering, or using the toilet by guards of the opposite sex. In those circuits, courts weigh the privacy interests of prisoners against the operational needs of prison authorities, including efficient staffing and maintenance of security, in order to determine whether particular prison practices or physical arrangements that result in such monitoring are reasonable. The Seventh Circuit held in this case, over Chief Judge Posner's dissent, that prisoners have no constitutionally protected interest in not being monitored while naked or engaged in intimate functions by guards of the opposite sex. In the Seventh Circuit, therefore, no balancing of prisoner privacy and prison needs is required. The question presented is:

Whether prisoners have a constitutionally cognizable interest in not being routinely and deliberately observed undressed or using the shower or toilet by guards of the opposite sex.

PARTIES TO THE PROCEEDING

Michael F. Sheahan, James W. Fairman, and Raul Estrada were defendants-appellees below and are respondents in this proceeding. A fourth defendant-appellee, Thomas J. Charnogorsky, was voluntarily dismissed prior to oral argument in the court of appeals and is not a respondent in this proceeding. Petitioner is no longer pursuing a claim against a fifth defendant-appellee, Richard J. Phelan, the named party in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Albert Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

Judge Easterbrook's opinion for the court of appeals and Judge Posner's dissenting opinion (App., *infra*, 1a-22a) are reported at 69 F.3d 144. The order denying the petition for rehearing and suggestion for rehearing en banc over four dissents (App., *infra*, 23a-24a) is not reported. The opinion of the district court (App., *infra*, 25a-30a) is unofficially reported at 1993 WL 388827 (N.D. Ill. Sept. 28, 1993).

JURISDICTION

The court of appeals entered judgment on October 24, 1995 and denied petitioner's request for rehearing and rehearing en banc on January 29, 1996. On April 4, 1996, Justice Stevens granted petitioner 30 additional days in which to file his petition, to and including May 28, 1996. This petition is filed within the time allowed by Justice Stevens' order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides in relevant part: "The right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated."

The Eighth Amendment to the U.S. Constitution provides in relevant part: "Excessive bail shall not be required, * * * nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

Petitioner Albert Johnson's *pro se* Section 1983 complaint alleged that as a pretrial detainee at the Cook County Jail in Chicago he was routinely and deliberately observed by female prison guards while he was undressed, using the shower, and using the toilet; that this invasion of privacy violated his constitutional rights; and that prison officials could satisfy their constitutional obligations by making minor physical adjustments, such as improved screens and partitions around shower and toilet facilities.

The Seventh Circuit majority, in an opinion by Judge Easterbrook, affirmed dismissal of Johnson's complaint for failure to state a claim. In direct conflict, Judge Easterbrook acknowledged, with decisions in other circuits which "say that the Constitution forbids deliberate cross-sex monitoring" (App., *infra*, 7a), the court of appeals held that prisoners have no constitutionally cognizable interest in not being observed engaged in intimate personal functions by guards of the opposite gender. Nor could the court find in the Eighth Amendment any "right not to be seen by the other sex." *Ibid.* Thus, because no constitutionally protected interests are implicated, the court held, prison officials are not required to consider even minor, nondisruptive, and inexpensive changes to prevent routine cross-gender observation of naked prisoners.

Criticizing the majority for "making a judgment that condones barbarism" (App., *infra*, 22a), Chief Judge Posner observed in dissent that "[n]o [other] case holds that the surveillance of naked inmates by guards of the opposite sex is lawful per se." *Id.* at 18a. Judge Posner himself rejected the Fourth Amendment search and "right to privacy" analyses adopted in most other circuits. Instead, Judge Posner would have reversed the district court's dismissal on the ground that Johnson's complaint stated a claim that he

had been subjected to cruel and unusual psychological punishment prohibited by the Eighth Amendment.

The Seventh Circuit's decision marks the nadir of prisoner privacy rights. No other circuit has held that routine and deliberate cross-gender monitoring of showering, defecating, or urinating prisoners does not even implicate the Constitution. This Court's review is necessary to address the circuit split created by the Seventh Circuit's ruling in this case, to settle major doctrinal differences in the lower courts' analyses of recurring prisoner cross-gender observation claims, and to correct the erroneous decision below.

1. Johnson's Complaint

Johnson, a pretrial detainee at the Cook County Jail, filed an Inmate Grievance with the Cook County Department of Corrections complaining that his "personal privacy [was] violated" because "[f]emale guards are assigned to jobs * * * which permit them to periodically view me and other inmates in various states of undress while showering, sleeping and using the toilet facilities." Exh. 2 to Cmplt. Johnson explained that "[w]hen a female correctional officer is assigned to work a dorm it is her duty and responsibility * * * to constantly supervise all inmates in the dorms" and to survey "the general toilet and shower facilities, which [are] in an open unobstructed area except by a thin sheet that can be seen through." *Ibid.* Johnson suggested that "[t]his problem could be easily corrected by installing * * * fixed partitions, or screens such as the type that are in the other divisions" in the jail. *Ibid.*

Johnson subsequently filed a *pro se* Section 1983 suit repeating the allegations made in his grievance (which he attached to his complaint). Specifically, Johnson alleged that inmates "are under observation 24 hours a day" (Cmplt. at 4-B); that female correctional officers' assigned duties included "supervising movements, making counts, and

making periodic unannounced spot-checks," in carrying out which duties they viewed Johnson engaged in intimate bodily functions (*id.* at 4-C); and that Johnson was also seen using the shower and toilet by female correctional officers "from the flag/hall area where [correctional officers] usually sit when they are not doing anything." *Ibid.* Johnson elaborated, in his *pro se* brief opposing dismissal, that he was subjected on a "daily basis" to viewings by female correctional officers while he was "showering, defecating, and urinating." App. to C.A. Br. at A28.

Johnson professed feelings of "embarrassment and humiliation" as a result of this cross-gender observation (Cmplt. at 5), and stated that his "Fourteenth and First Amendment Rights" had been violated, that he was being "punished without due process and equal protection," and that his "right to personal privacy [and] also my religious belief pertaining to Christian modesty is being infringed." *Id.* at 4-A. Johnson requested that defendants be ordered to take remedial measures "to provide greater protection of pretrial detainees/inmates personal privacy while showering and defecating by installing screens or partitions in the toilet and shower facilities." *Id.* at 5-A.

2. The District Court's Decision

The district court, which had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), dismissed Johnson's complaint with prejudice for failure to state a claim.[1]

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[1] Johnson sued Cook County officials Phelan and Charnogorsky and prison officials Sheahan, Fairman, and Estrada in their individual and official capacities. Johnson does not dispute the dismissal of his claims against the Cook County officials and against prison officials in their official capacities; only the claims against prison officials in their personal capacities are at issue.

The district court recognized that prisoners have a "legitimate privacy interest in shielding their unclothed bodies from view by members of the opposite sex." App., *infra*, 29a. But, failing to accord the usual leeway to prisoner complaints drafted without the assistance of counsel and in any event mischaracterizing Johnson's allegations, the court held that the complaint alleged only "incidental and inadvertent" observation. *Ibid.* The court concluded that in those circumstances Johnson's privacy interests were minimal and—without having heard any evidence—that they were outweighed by the prison's need for security as well as by the right of women guards to equal employment opportunities. *Id.* at 29a-30a.

3. The Court of Appeals' Decision

Unlike the district court, the Seventh Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, squarely faced the allegation in Johnson's complaint that cross-sex monitoring in Cook County Jail was deliberate and occurred on a routine basis. Over Judge Posner's dissent, the court held that prisoners and pretrial detainees have *no* constitutionally cognizable interest in not being routinely observed undressed, defecating, and urinating by guards of the opposite sex.

a. The Seventh Circuit held that under *Hudson* v. *Palmer*, 468 U.S. 517 (1984), and *Bell* v. *Wolfish*, 441 U.S. 520 (1979), Johnson failed to state a Fourth Amendment claim. Taken together, the court believed, those decisions mean that *no* form of observation of prisoners or pretrial detainees can constitute an unreasonable search. Guards may "watch and regulate every detail" of prisoners' lives under *Hudson*, the majority reasoned; and *Wolfish* upholds the reasonableness of (same sex) body cavity searches of pretrial detainees. App., *infra*, 2a-3a.

Judge Posner agreed with the majority that under *Hudson* the Fourth Amendment is inapplicable to searches

within prisons. App., *infra*, 15a. He disagreed, however, with the majority's view that *Wolfish* speaks to the issue of whether routine cross-sex monitoring raises any constitutionally cognizable claim. Even though a pretrial detainee may occasionally be subjected to a body cavity search performed by a guard of the same sex as the detainee, it does not follow, Judge Posner reasoned, "that no constitutional issue is raised if the search is performed by a male guard on a female prisoner, or a female guard on a male prisoner; * * * or if what is being watched is the prisoner's genitalia rather than the interior of his [or her] rectum." *Id.* at 19a.

b. The court of appeals held that because Johnson could not assert a Fourth Amendment claim, he was also precluded from claiming a violation of his right to privacy. Citing *Graham* v. *Connor*, 490 U.S. 386 (1989), and *Albright* v. *Oliver*, 510 U.S. 266 (1994), the court held that prisoners cannot "substitute" a privacy claim for a Fourth Amendment claim, because substantive due process "does not trump the fourth amendment." App., *infra*, 3a-4a. Moreover, the court maintained, "privacy" is not a useful legal framework to be applied to prisoners' interests in hiding their bodies from the view of guards of the opposite sex because it "has too many other connotations." *Id.* at 3a.

In addition, the court stated, cross-sex monitoring survives a substantive due process challenge under *Turner* v. *Safley*, 482 U.S. 78 (1987), because it is "reasonably related to legitimate penological interests": facilitating the surveillance of prisoners and allowing female guards "to participate in the normal activities of guarding." However, on the record in this case, which is limited to the pleadings, the court could not examine whether changes could readily be made to increase prisoner privacy without compromising security or women guards' career opportunities. Rather, it emphasized the deference owed to decisions made by prison administrators. App., *infra*, 4a.

Judge Posner agreed that the legal concept of "privacy" is too "remote" from the ordinary meaning of the word to be useful in analyzing Johnson's claims. He thought the parties' references to the "right of privacy" understandable, however, because "[c]ountless cases, including our own * * * have done the same thing." App., *infra*, 15a, citing *Canedy* v. *Boardman*, 16 F.3d 183 (7th Cir. 1994); *Cornwell* v. *Dahlberg*, 963 F.2d 912, 916-917 (6th Cir. 1992); *Cookish* v. *Powell*, 945 F.2d 441, 446 (1st Cir. 1991); and *Cumbey* v. *Meachum*, 684 F.2d 712 (10th Cir. 1982).

c. Finally, the court held that Johnson failed to state a claim for violation of the Eighth Amendment prohibition against cruel and unusual punishments. According to the majority, Johnson had not alleged the "demanding mental-state component" of the Eighth Amendment—that defendants "want[ed] to injure the prisoner or [knew] of and disregard[ed] a substantial risk that harm w[ould] befall the prisoner." App., *infra*, 8a. While Johnson had adequately alleged that cross-sex observation was deliberate, the court ruled, he had not contended that prison officials adopted the practice in order to injure or humiliate him. *Id.* at 8a-9a. Moreover, cross-sex surveillance does not involve "unnecessary and wanton infliction of pain," but allows prisons to use staff efficiently and to avoid making sex a criterion of employment. *Id.* at 5a-6a.

Dissenting, Judge Posner would have remanded the case for fact finding because the Eighth Amendment requires "that reasonable efforts be made to prevent frequent, deliberate, gratuitous exposure of nude prisoners of one sex to guards of the other sex." App., *infra*, 19a. Noting the strength of "the nudity taboo" in the United States, Judge Posner would have recognized that the exposure of naked prisoners to guards of the opposite sex may be a cruel and unusual psychological punishment. *Id.* at 14a-16a.

Judge Posner complained that parading naked prisoners before guards of the opposite sex marks them as "a type of vermin, devoid of human dignity and entitled to no respect." App., *infra*, 13a. He warned against exaggerating the "distance between [prisoners and] 'us,' the lawful ones, the respectable ones," observing that the inmate population numbers 1.5 million; that a larger fraction of the population has spent time in jail at some point in their lives; and that among those in jail are pre-trial detainees who have not been convicted of a crime, the innocent, those convicted of minor offenses, and those whose crimes involved no evil intent. Judge Posner refused to deny this "non-negligible fraction of the American population * * * the rudiments of humane consideration." *Id.* at 13a-14a.

Judge Posner rejected as baseless "hyperbole" the majority's assertion (unsupported by any factual record) "that a decision for Johnson would mean that 'female guards are shuffled off to back office jobs.'" App., *infra*, 19a. He pointed out that, in any event, the statutory protections of Title VII cannot "override the Constitution," nor can the equal protection clause "license the infliction of cruel and unusual punishments." *Id.* at 17a.

Judge Posner also objected that the majority had confused "motive and intent." The cruel and unusual punishments clause prohibits more than sadistically motivated inflictions. The "deliberate indifference" component of an Eighth Amendment claim is simply the "deliberate adoption of a measure that constitutes cruel and unusual punishment"—which Johnson had fairly alleged. App., *infra*, at 20a-22a. Cross-sex monitoring satisfies the requirement of deliberateness if prison officials know that they are subjecting prisoners to "gratuitous humiliation," even if they are "not actuated by any punitive purpose." *Id.* at 21a.

Although agreeing with the majority that "the hard choices made by prison administrators" are entitled to respect, Judge Posner pointed out that "[t]here is no record" and hence "no basis * * * for supposing that such a choice was made here, or for believing that an effort to limit cross-sex surveillance would involve an inefficient use of staff." App., *infra*, 22a. Judge Posner concluded that "[i]t would be nice to know a little more about the facts before making a judgment that condones barbarism," and would have remanded the case to the district court to develop the record. *Ibid.*

d. Johnson moved for rehearing en banc. With Judges Flaum and Rovner recused, that motion was denied by a vote of six to four. App., *infra*, 23a-24a.

REASONS FOR GRANTING THE PETITION

In conflict with the majority of circuits, the Seventh Circuit held in this case that deliberate, routine surveillance of pre-trial detainees and prisoners when they are undressed, showering, defecating, or urinating, conducted by corrections officers of the opposite sex, implicates no interests protected by the Fourth Amendment or the constitutional right to privacy and hence does not have to be shown to be reasonable. Nor, the majority held, does cross-gender surveillance of prisoners engaged in intimate bodily functions raise Eighth Amendment concerns, except in the improbable event that "defendants adopted their [surveillance] policy to cause injury." App., *infra*, 9a. According to the court, then, cross-gender observation raises no constitutional issue; in the Seventh Circuit it "is lawful per se." *Id.* at 18a.

The question presented is "whether a prisoner has an interest that the Constitution protects in hiding his naked body from guards of the opposite sex" (App., *infra*, 15a)—an interest that would have prevented dismissal of this suit on the pleadings before any evidence about the reasonableness of Cook County Jail's practices had been gathered. Both

opinions below acknowledge that the courts of appeals are divided on that question. *Id.* at 7a-8a, 15a, 18a-19a. Both opinions note that circuits holding that cross-gender observation implicates the Constitution disagree about the source of this protection. *Id.* at 5a, 7a-8a, 15a-19a. And the opinions evidence a deep division concerning the meaning of this Court's precedents, which the majority believed doom petitioner's claim (*id.* at 3a) but which the dissent—like courts in other circuits—thought inconclusive.

The question presented is ripe for this Court's review. It is a recurring issue in the lower courts, as demonstrated by the plethora of reported appellate decisions (which are only the tip of the iceberg). It is an issue on which, incontestably, there is a direct circuit split, with the Seventh Circuit standing alone in answering the question no. And it is an issue on which the courts of appeals are in considerable analytic disarray, unable to agree whether a prisoner's right to be free from unnecessary cross-sex surveillance is located in the Fourth Amendment, in a "right to privacy," or (as Judge Posner would hold) only in the Eighth Amendment. This Court should grant certiorari to settle the circuit split and provide much needed guidance to the lower courts on common but perplexing questions that consume considerable judicial and governmental resources.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH NUMEROUS RULINGS OF OTHER COURTS OF APPEALS

Many circuits have addressed cross-gender surveillance or search claims brought by prisoners under Section 1983. With the exception of the Seventh Circuit in this case, *not one* has held that prisoners lack a constitutionally cognizable interest in being free from intrusions into their bodily privacy by corrections employees of the opposite sex. Each Circuit to consider the issue has either explicitly held that prisoners

have constitutional rights that are implicated by deliberate and routine cross-sex monitoring, or has at least assumed that prisoners retain such rights and accordingly has inquired into the needs of prison administrators to determine if some modification of prison practices is constitutionally required.[2]

Thus, the First, Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have all recognized that routine cross-gender viewing of naked, showering, defecating, or urinating prisoners triggers constitutional scrutiny. See, *e.g.*, *Cookish* v. *Powell*, 945 F.2d 441, 446-447 (1st Cir. 1991) (constitutional privacy rights are implicated "when guards of the opposite sex regularly observe [inmates] engaged in personal activities, such as undressing, showering, and using the toilet," but not by "inadvertent, occasional, casual, and/or restricted observations"); *Forts* v. *Ward*, 621 F.2d 1210, 1214 (2d Cir. 1980) (assuming that "the nighttime viewing of completely or partially unclothed women inmates by male prison guards" infringes constitutional privacy rights); *Strickler* v. *Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("when not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates his constitutional rights"); *Cornwell* v. *Dahlberg*, 963 F.2d 912, 916 (6th Cir. 1992) ("this Circuit has joined others in recognizing

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[2] Some cases cited in this section, such as *Jordan* v. *Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), involve surveillance of female prisoners by male guards. There is no reason why the constitutional analysis of cross-sex surveillance claims should be different depending on the gender of the prisoner. Certainly, as Judge Posner observed, the discussion in the Seventh Circuit's opinion in this case implies "that female inmates have no constitutionally protected interest in not being seen in the nude by male guards." App., *infra*, 18a.

that a convicted prisoner maintains some reasonable expectations of privacy while in prison, particularly where * * * related to forced exposure to strangers of the opposite sex"); *Michenfelder* v. *Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (prisoners "retain a limited right to bodily privacy" that encompasses "[s]hielding one's unclothed figure from the view of * * * strangers of the opposite sex"); *Cumbey* v. *Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (privacy rights are implicated when "guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities, or showering"); *Hardin* v. *Stynchcomb*, 691 F.2d 1364, 1373 (11th Cir. 1982) ("inmates' retained privacy rights may be unnecessarily invaded by having deputies of the opposite sex * * * oversee use of toilet and shower facilities").[3]

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[3] Until this case, the Seventh Circuit took the same position. See *Canedy* v. *Boardman*, 16 F.3d 183, 186-187 (7th Cir. 1994); *Torres* v. *Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1526, 1528 (7th Cir. 1988); *Smith* v. *Fairman*, 678 F.2d 52, 53-55 (7th Cir. 1982). The majority distinguished *Canedy* on the ground that it concerned cross-gender *tactile* searches. App., *infra*, at 7a. But the court's reasoning here leaves no room for constitutional claims based on tactile searches either. And the majority in any event misread *Canedy*. The prisoner in *Canedy* (whom counsel of record represented on appeal) alleged in a separate count that routine cross-gender surveillance violated his privacy rights. The Seventh Circuit reversed the district court's dismissal of that surveillance count, squarely holding that it stated a claim. See 16 F.3d at 187 (while occasional and inadvertent sightings of naked male inmates by female prison guards do not violate the inmates' right to privacy, "that right is violated where this observation is * * * *a regular occurrence*") (emphasis added).

The courts of appeals differ as to the source of prisoners' constitutional interests in avoiding cross-gender surveillance. Because "[o]bservation is a form of search" (App., *infra*, 2a), some courts of appeals, in direct conflict with the ruling of the Seventh Circuit here, hold that prisoners have a constitutionally cognizable *Fourth Amendment* privacy interest in not being routinely monitored in intimate circumstances by guards of the opposite sex, infringement of which triggers a factual inquiry into the reasonableness of the practice. Typical of these decisions is *Kent* v. *Johnson*, 821 F.2d 1220, 1221 (6th Cir. 1987), adhered to after reconsideration in light of *Turner* v. *Safley* (482 U.S. 78 (1987)), 821 F.2d 1229. In *Kent*, the Sixth Circuit reversed dismissal of a male prisoner's Fourth Amendment complaint challenging a prison practice that allowed "female guards to view him performing necessary bodily functions in his cell and to view his naked body in the shower area." In stark contrast to the majority in this case, the Sixth Circuit observed (*id.* at 1226):

> Perhaps it is merely an abundance of common experience that leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason, for the obverse would be repugnant to notions of human decency and personal integrity.

The Ninth Circuit likewise recognizes that prisoner suits alleging that cross-gender surveillance violates the Fourth Amendment state a claim and require some factual inquiry into the justifications for the practice. *E.g.*, *Michenfelder*, 860 F.2d at 334 (noting that "[o]ur circuit's law respects an incarcerated prisoner's right to bodily privacy"; we "analyze [plaintiff's Fourth Amendment claim] by using *Turner* v. *Safley's* rational relationship test"). And the First Circuit

held in *Cookish*, 945 F.2d at 447, that by October 1987 the law was clear that "observations of an inmate's naked body by a guard of the opposite sex * * * other than inadvertent, occasional, casual, and/or restricted * * * observation would (in all likelihood) violate the Fourth Amendment").

Other courts of appeals' decisions, equally at odds with the Seventh Circuit's ruling here, locate a prisoner's right to be free from unreasonable cross-sex monitoring in the constitutional *"right to privacy."* These cases include, for example, in the Fourth Circuit, *Lee* v. *Bratten*, 1994 U.S. App. LEXIS 20669, at *9 (4th Cir. Aug. 8, 1994) (viewing of prisoners "while they are undressed by guards of the opposite sex when not reasonably necessary" violates "'their right of privacy'"), *Strickler*, 989 F.2d at 1387, and *Lee* v. *Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981); in the Tenth Circuit, *Cumbey*, 684 F.2d at 713-714 (holding that a prisoner's suit alleging "that female prison guards * * * are assigned to posts where they observe him dressing and undressing and using the toilet and the shower" stated a claim that his "constitutional rights to privacy are being violated"); and, in the Eleventh Circuit, *Fortner* v. *Thomas*, 983 F.2d 1024, 1026-1027, 1030 (11th Cir. 1993) (electing "to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'"). See also *Smith*, 678 F.2d at 53, 55 (case law holds that "inmates do have some right to avoid unwanted intrusions by persons of the opposite sex" and locates that right in "the Fourth Amendment guarantee of freedom from unreasonable searches or the more general right of personal privacy").

In addition, at least one court of appeals explicitly disagrees with the Seventh Circuit majority's position that cross-sex searches do not violate a prisoner's Eighth Amend-

ment right to be free of cruel and unusual punishment. In *Jordan* v. *Gardner*, 986 F.2d at 1522, the en banc Ninth Circuit held that "a policy that requires male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners" violates the Eighth Amendment. As Judge Posner pointed out in his dissent, "[w]hat Johnson alleges is worse" than the invasion of privacy held to run afoul of the Eighth Amendment in *Jordan*. App., *infra*, 19a.

Under each of these approaches, courts have inquired into the reasonableness of prison arrangements that result in routine cross-gender monitoring, including the availability of alternative arrangements that would eliminate or reduce invasions of prisoner privacy while also serving prison needs. See *Wolfish*, 441 U.S. at 559 (Fourth Amendment "test of reasonableness * * * requires a balancing of the need for the particular search against the invasion of personal rights that the search entails"); *Turner*, 482 U.S. at 90-91 (the existence of "an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests" is "evidence that the regulation does not satisfy the reasonable relationship standard"). Courts applying this balancing test to determine the constitutionality of cross-gender surveillance recognize that "[r]esolution of such cases requires a careful inquiry as to whether the competing interests can be satisfactorily accommodated before deciding whether one interest must be vindicated to the detriment of the other." *Forts* v. *Ward*, 621 F.2d 1210, 1212 (2d Cir. 1980).

This inquiry is not at all unmanageable. After balancing, courts sometimes require changes in particular prison practices (*e.g.*, *Jordan*, 986 F.2d at 1531); and sometimes they find that, in all the circumstances, no changes are necessary. *E.g.*, *Timm* v. *Gunter*, 917 F.2d 1093, 1101-1102 (8th Cir. 1990). Often, all the competing interests at stake can be accommodated. Thus, "[t]he majority of courts addressing

the issue of inmate privacy have granted relief to inmates without denying employment to guards of the opposite sex." Note, *Balancing Inmates' Right to Privacy with Equal Employment for Prison Guards*, 4 Women's Rights L. Rep. 243, 248 (1978). The factual inquiry that was short circuited by dismissal in this case has enabled most courts to find "a viable solution to the difficult problem of balancing the interests of all the parties involved." Comment, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 Iowa L. Rev. 428, 445 (1980).

The Seventh Circuit's ruling in this case is sharply in conflict with decisions in a majority of circuits and leaves pre-trial detainees and prisoners confined in Illinois, Indiana, or Wisconsin considerably worse off than their counterparts elsewhere in the Nation. There is no justification for this disparity in treatment. Nor is there any reason why a direct circuit split as to this recurring constitutional issue should be tolerated. The question presented has percolated through the lower courts for well over a decade, producing a confusion of different analytic approaches and consuming an enormous quantity of judicial, governmental, and private resources. It is time for this Court to intervene.

II. THE SEVENTH CIRCUIT'S DECISION IS WRONG

The Seventh Circuit erred in depriving prisoners of any right to be free from unreasonable cross-sex surveillance while dressing and undressing, showering, defecating, and urinating. As a majority of circuits recognize, routine cross-sex monitoring is too great an affront to dignity—too "degrading," "brutalizing," and dehumanizing—to escape constitutional scrutiny. App., *infra*, 13a; see *York* v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("[W]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strang-

ers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity"). "[T]he wearing of clothes is * * * a mark of man's distinctive dignity" (R. Posner, *Sex and Reason* 226 (1992)); violating that widely-shared, religiously-endorsed, and still very strong taboo on nudity unjustifiably reduces prisoners to a status "no better than animals." *Id.* at 14a.[4]

The Constitution protects prisoners from affronts to their dignity and humanity of the sort alleged by petitioner. Prison practices that result in routine cross-sex surveillance of naked prisoners engaged in intimate personal functions survive Fourth and Eighth Amendment scrutiny only if they are reasonable and no less intrusive, non-disruptive alternative that meets prison needs is readily, inexpensively available. *Turner*, 482 U.S. at 90-91. There is no factual record in this case; hence there was no way for the courts below to determine, on a motion to dismiss, if that reasonableness standard was satisfied.

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[4] Evidence that society recognizes the especially intrusive and demeaning nature of cross-sex surveillance is to be found in prison regulations, which frequently prohibit or limit the practice. Indeed, Illinois Department of Corrections' regulations governing Cook County Jail provide that "supervision shall be provided by a person of the same sex * * * [d]uring periods of personal hygiene activities and care such as showers, toileting, and related activities." 20 Ill. Admin. Code § 701.20(b)(1)(D) (1985 & Supp.).

A. The Seventh Circuit Erred In Relying On *Wolfish* And *Hudson* To Dismiss Petitioner's Fourth Amendment Claim

Prisoner surveillance, the court below recognized, is "a form of search." App., *infra*, 2a. It therefore falls within the literal scope of the Fourth Amendment. Prisoners continue to enjoy Fourth Amendment protections that are "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. at 523. This Court has never held that a right not to be subjected to unreasonable cross-gender surveillance is per se inconsistent with the goals of incarceration. And, with the exception of the Seventh Circuit in this case, the courts of appeals have rejected the notion that no "'justifiable' expectation of privacy is at stake" when such surveillance occurs. *Id.* at 525; see Section I, *supra*.

The Seventh Circuit erred in concluding that *Hudson* and *Bell* v. *Wolfish*, taken together, preclude all Fourth Amendment claims of unreasonable searches made by prisoners. App., *infra*, 3a. Those decisions may condone "constant vigilance" over inmates, as the majority asserted (*ibid.*), but they cannot fairly be said to speak to the claim made by petitioner.

Wolfish found occasional *same-sex* body cavity searches reasonable; it did not address cross-gender searches at all. The majority assumed that *Wolfish* covered the monitoring challenged here because it judged body cavity searches to be "a substantially greater intrusion" than cross-gender monitoring. App., *infra*, 6a. But daily observation of prisoners while dressing and undressing, showering, and using the toilet by guards of the opposite sex raises different constitutional concerns than occasional same-sex body cavity searches. As Judge Posner put it (*id.* at 19a):

> It does not follow [from *Wolfish*] that no constitutional issue is raised if the search is performed by a male guard on a female prisoner; or a female guard on a male prisoner * * * or if what is being watched is the prisoner's genitalia rather than the interior of his rectum.

On its face, *Hudson* does not speak to cross-sex monitoring either. In *Hudson*, a prisoner challenged the reasonableness of a search of possessions kept in his cell. Reasoning that it would be "literally impossible" for prisons to maintain security "if inmates retained a right of privacy in their cells" (468 U.S. at 527), this Court held that "the Fourth Amendment proscription against unreasonable searches does not apply *within the confines of the prison cell.*" *Id.* at 526 (emphasis added); see also *id.* at 538 (O'Connor, J., concurring) (arrest abates "privacy and possessory interests in personal effects" and therefore, searches "of the contents of an inmate's cell" are reasonable).

Thus, the courts of appeals consistently limit *Hudson* to cell searches and hold that surveillance and other searches of prisoners' bodies are properly subjected to Fourth Amendment scrutiny. See, *e.g.*, *Cornwell*, 963 F.2d at 916, and *Kent*, 821 F.2d at 1221 (Sixth Circuit); *Cookish*, 945 F.2d at 446 (First Circuit); *Michenfelder*, 860 F.2d at 332 (Ninth Circuit). For example, the Second Circuit in *Covino* v. *Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992), held that *Hudson* prohibited a Fourth Amendment claim "with respect to prison spaces," but that prisoners "retain a limited right to bodily privacy" that protects them from unreasonable searches.

Neither *Wolfish* nor *Hudson* individually hold that prisoners lack a constitutional right protecting them from unreasonable searches of their bodies. Nor is it apparent, except to the Seventh Circuit, how they together preclude a Fourth Amendment claim relating to cross-gender surveil-

lance. The usual Fourth Amendment reasonableness principles should apply.[5]

B. The Seventh Circuit Erred In Holding That Cross-Sex Monitoring Cannot Violate The Eighth Amendment

The court of appeals also erred in holding that Johnson's complaint did not adequately allege an Eighth Amendment violation. The majority's error stemmed from misapplying the rule in *Wilson* v. *Seiter*, 501 U.S. 294 (1991), that only a prison official who acts with "deliberate indifference" runs afoul of the Eighth Amendment. The majority thought that under *Wilson* and *Whitley* v. *Albers*, 475 U.S. 312 (1986), the Eighth Amendment is violated only when a prison has "inflicted pain pointlessly," and that the surveillance petitioner alleged was not "pointless" because the court could imagine nonpunitive justifications for it. App., *infra*, 5a-6a. But as Judge Posner showed in his dissent, the "relevant deliberateness" is not the motives of prison officials but whether there was a "deliberate adoption" of a practice that "constitutes cruel and unusual punishment." *Id.* at 20a.

Judge Posner correctly pointed out that a prison's disciplinary use of the thumbscrew and rack would constitute

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[5] Because of its context and purposes, cross-gender surveillance in prison is most readily analyzed as a Fourth Amendment search; there will usually be no reason to analyze the practice under the general rubric of the "right to privacy." In any event, the Fourth Amendment's reasonableness standard may be little if any different from the inquiry that would be conducted to adjudicate a substantive due process privacy claim under *Turner* v. *Safley*. See 482 U.S. at 89 (asking whether a regulation is "reasonably related to legitimate penological interests," in light of easily available alternatives); *Wolfish*, 441 U.S. at 559 n.40.

cruel and unusual punishment even if the measure were adopted "merely to maintain good order" or to "save money." App., *infra*, 20a. Likewise, when a prison adopts a practice of "deliberately expos[ing]" naked prisoners to the gaze of guards of the opposite sex—a "cruel and unusual psychological punishment" (*id.* at 17a)—it is "irrelevant" if the prison officials' motive was merely to ease prison administration. If prison officials know that cross-gender surveillance subjects inmates to "gratuitous humiliation," the "infliction is deliberate," reasoned Judge Posner, even if not motivated by "punitive purpose." *Id.* at 21a.

The majority's reason for rejecting petitioner's Eighth Amendment claim on the pleadings was therefore in error. As the Ninth Circuit held in *Jordan*, 986 F.2d at 1522, cross-gender searches may violate the Eighth Amendment. The court should have reversed the dismissal of petitioner's claim and remanded for a factual inquiry into whether the infliction of psychological pain through deliberate, routine cross-sex monitoring was "unnecessary and wanton." *Whitley*, 475 U.S. at 320.

Of the numerous courts of appeals to have looked at this issue, only the Seventh Circuit has concluded that prisoners lack any constitutional right protecting them from deliberate, routine, and unreasonable cross-sex monitoring while they are undressed or engaged in intimate bodily functions. Moreover, the majority's inaccurate legal analysis has the potential to muddy Fourth and Eighth Amendment law. This Court should grant certiorari to resolve the clear circuit split and to guide the lower courts as they face similar claims in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3753

ALBERT JOHNSON,
Plaintiff-Appellant,

v.

RICHARD J. PHELAN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 1943—James H. Alesia, *Judge*.

ARGUED AUGUST 1, 1995—DECIDED OCTOBER 24, 1995

Before: POSNER, *Chief Judge*, and PELL and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*.

Albert Johnson brought this suit under 42 U.S.C. § 1983. According to his complaint, which the district court dismissed for failure to state a claim on which relief may be granted, female guards at the Cook County Jail are assigned to monitor male prisoners' movements and can see men naked in their cells, the

shower, and the toilet. Johnson sought damages from persons including the President of the Cook County Board and the Chairman of the County's Buildings and Zoning Commission. Most of the defendants have no relation to the events of which Johnson complains and were properly dismissed because § 1983 does not establish vicarious liability. See *Houston* v. *Sheahan*, 62 F.3d 902 (7th Cir. 1995). The district court also properly rejected Johnson's argument that different monitoring patterns in different cellblocks within the Jail violate the equal protection clause of the fourteenth amendment. 1993 U.S. Dist. LEXIS 13681 (N.D. Ill.). Johnson has abandoned on appeal any contention that monitoring in the local courthouse lockup's bathroom violates the Constitution. But his argument that cross-sex monitoring in the Jail violates the due process clause requires additional discussion in light of *Canedy* v. *Boardman*, 16 F.3d 183 (7th Cir. 1994), which holds that a right of privacy limits the ability of wardens to subject men to body searches by women, or the reverse. Our case involves visual rather than tactile inspections, and we must decide whether male prisoners are entitled to prevent female guards from watching them while undressed.

Observation is a form of search, and the initial question therefore is whether monitoring is "unreasonable" under the fourth amendment. So the Supreme Court conceived the issue in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), where a pretrial detainee argued that routine inspections of his body cavities violated the Constitution. (Johnson also was a pretrial detainee at the time of the events covered in his complaint, but in light of *Wolfish* he does not argue that detainees have rights exceeding those of prisoners following conviction.) The Court held that these searches are "reasonable" because they are prudent precautions against smuggling drugs and other contraband into prison. 441 U.S. at 558-60. Prisoners argued that metal detectors plus supervision of inmates' contacts with outsiders would be superior to body-cavity inspections. The Court replied that prisons need not adopt the best alternatives. 441 U.S. at 559-60 n.40. Less-restrictive-alternative arguments are too powerful: a prison always can do something, at some cost, to make prisons more habitable, but if courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators. *Wolfish* emphasized

what is *the* animating theme of the Court's prison jurisprudence for the last 20 years: the requirement that judges respect hard choices made by prison administrators. E.g., *Sandin* v. *Conner*, 115 S. Ct. 2293, 2299-2300 (1995); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349-50 (1987); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977); *Wolff* v. *McDonnell*, 418 U.S. 539, 561-63 (1974).

Wolfish assumed without deciding that prisoners retain some right of privacy under the fourth amendment. Five years later the Court held that they do not. *Hudson* v. *Palmer*, 468 U.S. 517, 526-30 (1984), observes that privacy is the thing most surely extinguished by a judgment committing someone to prison. Guards take control of where and how prisoners live; they do not retain any right of seclusion or secrecy against their captors, who are entitled to watch and regulate every detail of daily life. After *Wolfish* and *Hudson* monitoring of naked prisoners is not only permissible—wardens are entitled to take precautions against drugs and weapons (which can be passed through the alimentary canal or hidden in the rectal cavity and collected from a toilet bowl)—but also sometimes mandatory. Inter-prisoner violence is endemic, so constant vigilance without regard to the state of the prisoners' dress is essential. Vigilance over showers, vigilance over cells—vigilance everywhere, which means that guards gaze upon naked inmates.

Johnson mentions the fourth amendment but ignores *Wolfish* and *Hudson*. His principal argument uses the due process clause; and because he does not seek a hearing, he is invoking principles of substantive due process. Yet courts should not reverse the outcome of a fourth amendment analysis in the name of substantive due process. *Graham* v. *Connor*, 490 U.S. 386 (1989), and *Albright* v. *Oliver*, 114 S. Ct. 807 (1994), hold that substantive due process is not an appropriate substitute for analysis under provisions of the Constitution that address a subject directly, and in particular does not trump the fourth amendment. "Privacy" has too many other connotations—from the right of reproductive autonomy that has nothing to do with searches and seizures to the common law right to control the publication of certain facts about oneself, including the depiction of one's naked body, see *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229-30 (7th Cir.

1993)—to be a useful substitute for the fourth amendment (or, as we discuss below, the eighth).

What is more, moving ground from the fourth amendment to the fifth would not help Johnson. Under the due process clause the question is whether the regulation is "reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Surveillance of prisoners is essential, as *Wolfish* establishes. Observation of cells, showers, and toilets is less intrusive than the body-cavity inspections *Wolfish* held permissible. Guards do the surveillance. Male guards and female guards too—for Title VII of the Civil Rights Act of 1964 opens prisons to women and requires states to hire them unless sex is a bona fide occupational qualification, a high standard of necessity. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *United States* v. *Gregory*, 818 F.2d 1114 (4th Cir. 1987) (rejecting an argument that a desire to curtail cross-sex monitoring of naked prisoners makes sex a bona fide occupation qualification for prison guards); see also *United Auto Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). Unless female guards are shuffled off to back office jobs, itself problematic under Title VII, they are bound to see the male prisoners in states of undress. Frequently. Deliberately. Otherwise they are not doing their jobs. *Smith* v. *Fairman*, 678 F.2d 52 (7th Cir. 1982), puts two and two together, holding that in light of Title VII female guards are entitled to participate in the normal activities of guarding, including pat-down searches of male inmates. We held in *Torres* v. *Wisconsin Department of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc), a case filed by guards under Title VII, that a state could exclude men from one of its four prisons, in order to promote the female prisoners' rehabilitation. *Torres* did not say that the Constitution requires this exclusion; instead we deferred to the judgment of prison administrators that they needed to limit cross-sex monitoring to achieve penological objectives. Today deference leads to the opposite result: Cook County does not believe that cross-sex monitoring imperils its mission, and evenhanded willingness to accept prison administrators' decisions about debatable issues means that Johnson cannot prevail under the due process clause.

After holding in *Hudson* that prisoners lack any reasonable expectation of privacy under the fourth amendment, the Court

remarked that a prisoner could use the eighth amendment to overcome "calculated harassment unrelated to prison needs." 468 U.S. at 530. Similarly, the Court observed in *Graham* that the eighth amendment offers some protection supplementary to the fourth. 490 U.S. at 392, 394. We therefore think it best to understand the references to "privacy" in *Canedy* and similar cases as invocations of the eighth amendment's ban on cruel and unusual punishments. See *Jordan* v. *Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), which makes explicit the role of that provision.

Johnson's complaint (and the brief filed on his behalf in this court by a top-notch law firm) do not allege either particular susceptibility or any design to inflict psychological injury. A prisoner could say that he is especially shy—perhaps required by his religion to remain dressed in the presence of the opposite sex—and that the guards, knowing this, tormented him by assigning women to watch the toilets and showers. So, too, a prisoner has a remedy for deliberate harassment, on account of sex, by guards of either sex. Johnson does not allege this or anything like it. His case therefore does not present the sort of claim that *Hudson* holds in reserve. It does not satisfy the more general requirements of the eighth amendment either.

One who makes a claim under the cruel and unusual punishments clause must show that the state has created risk or inflicted pain pointlessly. "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) (internal quotations omitted). See also *Rhodes* v. *Chapman*, 452 U.S. 337 (1981); *Wilson* v. *Seiter*, 501 U.S. 294, 298-300 (1991); *Helling* v. *McKinney*, 113 S. Ct. 2475 (1993). Does cross-sex monitoring serve a function beyond the infliction of pain? Monitoring is vital, but how about the cross-sex part? For this there are two justifications.

First, it makes good use of the staff. It is more expensive for a prison to have a group of guards dedicated to shower and toilet monitoring (equivalently, a group that can do every function *except* this) than to have guards all of whom can serve each role in the prison. If only men can monitor showers, then female guards are less useful to the prison; if female guards can't perform this task,

the prison must have more guards on hand to cover for them. It is a form of featherbedding. *O'Lone* held that an interest in the efficient deployment of the staff permits the prison to block inmates from attending religious services, although religion has powerful protection in the first amendment. Similarly, an interest in efficient deployment of the staff supports cross-sex monitoring. See *Timm* v. *Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990), which concludes that "opposite-sex surveillance of male inmates, performed on the same basis as same-sex surveillance," is constitutionally permissible. By the same token, the prison may assign homosexual male guards to monitor male prisoners, heterosexual male guards to monitor effeminate male homosexual prisoners, and so on. There are too many permutations to place guards and prisoners into multiple classes by sex, sexual orientation, and perhaps other criteria, allowing each group to be observed only by the corresponding groups that occasion the least unhappiness.

Second, cross-sex monitoring reduces the need for prisons to make sex a criterion of employment, and therefore reduces the potential for conflict with Title VII and the equal protection clause. Cells and showers are designed so that guards can see in, to prevent violence and other offenses. Prisoners dress, undress, and bathe under watchful eyes. Guards roaming the corridors are bound to see naked prisoners. A prison could comply with the rule Johnson proposes, and still maintain surveillance, only by relegating women to the administrative wing, limiting their duties (thereby raising the cost of the guard complement), or eliminating them from the staff.

To the riposte that Title VII and the equal protection clause can't authorize a violation of the eighth amendment, we rejoin: True enough, but not pertinent. A warden must accommodate conflicting interests—the embarrassment of reticent prisoners, the entitlement of women to equal treatment in the workplace. A state may reject the prisoner's claim if it has a reason, as *Wolfish* establishes for a substantially greater intrusion. The interest of women in equal treatment is a solid reason, with more secure footing in American law than prisoners' modesty, leading to the conclusion that there is no violation of the eighth amendment. We held as much already in *Smith* v. *Fairman*. When interests clash,

a judge must prefer those based on legislative decisions over those that reflect their own views of sound policy. The premise of judicial review is that the Constitution is an authoritative decision binding on all branches of government; when it has only such substance as judges pour into it themselves, the decisions of the elected branches prevail. *Canedy* accordingly avowed reluctance to do more than forbid cross-sex body searches, 16 F.3d at 187, which it conceived as pointless debasement. Anonymous visual inspections from afar are considerably less intrusive and carry less potential for "the unnecessary and wanton infliction of pain". To the extent incautious language in *Canedy* implies that deliberate visual inspections are indistinguishable from physical palpitations, its discussion is dictum. Further reflection leads us to conclude that it should not be converted to a holding.

How odd it would be to find in the eighth amendment a right not to be seen by the other sex. Physicians and nurses of one sex routinely examine the other. In exotic places such as California people regularly sit in saunas and hot tubs with unclothed strangers. Cf. *Miller* v. *South Bend*, 904 F.2d 1081 (7th Cir. 1990) (en banc) (holding that there is a constitutional right to dance nude in public), reversed under the name *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991). Most persons' aversion to public nudity pales compared with the taboo against detailed inspections of body cavities, yet the Court found no constitutional obstacle to these in *Wolfish*; the Constitution does not require prison managers to respect the social conventions of free society. Drug testing is common, although this often requires observation of urination. *Vernonia School District 47J* v. *Acton*, 115 S. Ct. 2386 (1995) (drug testing of seventh grade boy as condition of participation in sports is "reasonable" under the fourth amendment); see also *Dimeo* v. *Griffin*, 943 F.2d 679, 682-83 (7th Cir. 1991) (en banc), in which this court treated the imposition on privacy as slight. More to the point, the clash between modesty and equal employment opportunities has been played out in sports. Women reporters routinely enter locker rooms after games. How could an imposition that male athletes tolerate be deemed cruel and unusual punishment?

Some cases say that the Constitution forbids deliberate cross-sex monitoring (as opposed to infrequent or accidental sightings).

See *Cornwell* v. *Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992) (basing this conclusion on the fourth amendment, but without mentioning *Hudson*); *Lee* v. *Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (decided three years before *Hudson*). Decisions such as *Timm* and *Grummett* v. *Rushen*, 779 F.2d 491 (9th Cir. 1985), which hold that cross-sex monitoring is constitutional, could be treated as fact-bound, although some of their language is unqualified (we have quoted such a passage from *Timm*). Each emphasized that the female guards' views were not universally unobstructed. But if this is important (and we do not think it is), Johnson's own complaint brings the case within the scope of *Timm*. Johnson alleges that

> when a female correctional officer is assigned to work a dorm it is her duty and responsibility to make counts, also to constantly supervise all inmates in the dorms, making periodic, unannounced spot checks of inmates in their living area, and s[u]rveying in the remainder of the area such as the general toilet, and shower facilities, which is in an open unobstructed area, except by a thin sheet that can be seen through.

Thus Johnson tells us that the Jail offers some, but imperfect, shielding from guards' observation, exactly the situation that the eighth circuit held permissible in *Timm*. We agree with that conclusion. See also *Jordan* v. *Gardner*, 986 F.2d at 1545-67 (Wallace, Wiggins, Trott & Kleinfeld, JJ., dissenting).

Any practice allowed under the due process analysis of *Turner* is acceptable under the eighth amendment too—not only because the objective component of cruel and unusual punishment is more tolerant toward wardens, but also because the eighth amendment has a demanding mental-state component. *Farmer* v. *Brennan*, 114 S. Ct. 1970 (1994), holds that the standard is criminal recklessness. The guard or warden must want to injure the prisoner or must know of and disregard a substantial risk that harm will befall the prisoner. Johnson does not allege that any of the defendants sought to humiliate him. Although he filed the complaint pro se, his lawyer did not add this allegation to the brief and showed no inclination to advance it when pressed at oral argument. Of course, we must grant Johnson the benefit of all allegations in the

complaint and everything he might prove consistent with that document. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957); *Bartholet* v. *Reishauer A.G. (Zürich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). The district court assumed that the cross-sex viewing was inadvertent, an inappropriate step when evaluating a complaint under Rule 12(b)(6). But what Johnson wants to show is not that the defendants adopted their policy to cause injury, but that they ignored his sensibilities. He must believe it sufficient to show that they acted deliberately.

Put the eighth amendment aside for a moment and consider the question whether a "deliberate" decision—that is, a considered choice with knowledge of the consequences—establishes "intent" for purposes of constitutional provisions containing a mental-state ingredient. That question has been before the Supreme Court many times, and the answer is "no." A good example is *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), apropos because it deals with sex discrimination. Massachusetts decided to give military veterans an absolute, life time preference in employment. Approximately 98% of veterans are male, and as a result the bureaucracy is overwhelmingly male. A three-judge district court held the preference unconstitutional. Recognizing that the equal protection clause forbids only disparate treatment, and not disparate impact, see *Washington* v. *Davis*, 426 U.S. 229 (1976), the district court observed that people are deemed to intend the natural and probable consequences of their acts. Massachusetts adopted the preference deliberately, and it maintained the preference after recognizing that it excluded many qualified women from the civil service. The Supreme Court acknowledged all of this but held that deliberate acts, with knowledge of the consequences, do not establish "intent" in the constitutional sense—for, if they did, then the distinction between disparate treatment and disparate impact would collapse as soon as anyone informed the decisionmaker of the impact. After a canvass of its cases, the Court concluded:

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

442 U.S. at 279 (citation and footnotes omitted). Since *Feeney* the distinction between choices made "because" the decisionmaker wants to achieve particular consequences, and those "in spite of" unwelcome effects, has been a staple of constitutional law. See, e.g., *Miller* v. *Johnson*, 115 S. Ct. 2475, 2488 (1995).

Wardens make many choices that have unpleasant consequences for prisoners, and frequently wardens wish that they could do things differently. Budgetary shortfalls may dictate that prisoners live in cramped conditions, even though wardens know that penological purposes would be better served by additional space. The question whether a deliberate choice to put two prisoners in a cell with only 100 square feet of space satisfied the intent component of the eighth amendment came up in *Wilson* v. *Seiter*. Prisoners alleged that the dilapidated facility had "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing [of regular inmates] with mentally and physically ill inmates." 501 U.S. at 296. The warden knew all about this, and official decisions led to the problems—for example, the state spent money on guards' salaries rather than better food facilities. The Court assumed that conditions at the prison fell below objectively permissible standards but held that the prisoners had not demonstrated the essential mental state.

To put this differently, the question in *Wilson* was whether the mental-state requirement applies to systemic conditions, which affect all prisoners. The Court answered yes, acknowledging that this could perpetuate some unwelcome conditions:

> The United States suggests that a state-of-mind inquiry might allow officials to interpose the defense that, despite good-faith efforts to obtain funding, fiscal constraints beyond their control prevent the elimination of inhumane conditions. Even if that were so, it is hard to understand how it could control the meaning of "cruel and unusual punishment" in the Eighth Amendment. An intent requirement is either implicit in the word "punishment" or is not; it cannot be alternately required and ignored as policy conditions might dictate.

501 U.S. at 301-02. "If the pain inflicted is not formally meted out *as punishment* by the statute or sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* at 300 (emphasis in original). No intent to injure means no "punishment"; and no "punishment," no violation.

Let us test this with an illustration. Suppose the warden decides to issue guns to the guards, a step that in the absence of an ongoing riot violates contemporary norms because weapons create risks. Prisoners may seize them and shoot the guards or each other; guards may discharge them accidentally, injuring the prisoners. The decision to issue the guns is deliberate, and everyone knows that some injuries will follow. The warden hopes that a reduction in violence within the prison will compensate for the new risk. Can a prisoner obtain an injunction excluding guns from the prison on the ground that the risk exceeds the anticipated benefits? Or suppose the inevitable happens: a guard shoots a prisoner. Has the warden violated the eighth amendment? The answer from *Whitley* is "no," because the warden did not want harm to come to the prisoners and adopted the policy in an attempt to reduce violence. The policy was not designed to punish anyone and therefore, under *Whitley*, *Wilson*, and *Farmer*, does not violate the eighth amendment. A warden displays "deliberate indifference" only if he *ignores* the costs to prisoners, excluding them from the calculus of costs and benefits, or if he allows guns into the prison because he wants prisoners to suffer. An incorrect assessment of recognized costs and benefits is just negligence, which does not violate the fifth amendment (even if "gross," see *Archie* v. *Racine*, 847 F.2d 1211, 1218-20 (7th Cir. 1988) (en banc)), and does not violate the eighth amendment either. Cf. *Collins* v. *Harker Heights*, 503 U.S. 115 (1992) (public policies that create risks for employees do not violate the Constitution, even if the risks are taken knowingly); *Walker* v. *Rowe*, 791 F.2d 507 (7th Cir. 1986) (same principle, applied to risks that lead to death of prison guards). Yet this gun policy is deliberate in the same sense as the policy permitting cross-sex monitoring, and injury is as predictable as the existence of embarrassed inmates.

Where does this leave us? The fourth amendment does not protect privacy interests within prisons. Moving to other amendments does not change the outcome. Cross-sex monitoring is not

a senseless imposition. As a reconciliation of conflicting entitlements and desires, it satisfies the *Turner* standard. It cannot be called "inhumane" and therefore does not fall below the floor set by the objective component of the eighth amendment. And Johnson does not contend that his captors adopted their monitoring patterns because of, rather than in spite of, the embarrassment it causes some prisoners. He does not submit that the warden ignored his sensibilities; he argues only that they received too little weight in the felicific calculus. Like the district court, therefore, we conclude that the complaint fails to state a claim on which relief may be granted.

AFFIRMED.

POSNER, *Chief Judge*, concurring and dissenting. I agree with the district judge and my colleagues that Johnson's equal protection claim has no possible merit, that there is no possible basis for imputing liability to the president of the Cook County Board of Commissioners, and that the claims against the defendants in their official capacities must be dismissed as unauthorized suits against the State of Illinois. That is where my agreement ends.

The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, like so much in the Bill of Rights, is a Rorschach test. What the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment. No other theory of constitutional interpretation can explain the elaborate edifice of death-penalty jurisprudence that the Supreme Court has erected in the name of the Eighth Amendment. Or the interpretation of the amendment as a charter, however limited, of the rights of prisoners. The limitations imposed by the amendment might be thought, indeed were thought for more than 150 years after the amendment was adopted, to end with the sentence, leaving the

management of prisons, the informal "punishment" meted out by brutal guards, constitutionally unregulated.

The critical values, in giving content to the Eighth Amendment, are those of the Justices of the Supreme Court. My colleagues believe that the Justices have spoken to the issue presented by this case. I think that they have not, and I shall try to show this. But I want first to lay out the essential background of facts and values on which I believe the judgment in this case must ultimately turn.

There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. In particular there would be no inhibitions about using prisoners as the subject of experiments, including social experiments such as the experiment of seeing whether the sexes can be made interchangeable. The parading of naked male inmates in front of female guards, or of naked female inmates in front of male guards, would be no more problematic than "cross-sex surveillance" in a kennel.

I do not myself consider the 1.5 million inmates of American prisons and jails in that light. This is a non-negligible fraction of the American population. And it is only the current inmate population. The fraction of the total population that has spent time in a prison or jail is larger, although I do not know how large. A substantial number of these prison and jail inmates, including the plaintiff in this case, have not been convicted of a crime. They are merely charged with crime, and awaiting trial. Some of them may actually be innocent. Of the guilty, many are guilty of sumptuary offenses, or of other victimless crimes uncannily similar to lawful activity (gambling offenses are an example), or of esoteric financial and regulatory offenses (such as violation of the migratory game laws) some of which do not even require a guilty intent. It is wrong to break even foolish laws, or wise laws that should carry only civil penalties. It is wrongful to break the law even when the lawbreaker is flawed, weak, retarded, unstable, ignorant, brutalized, or profoundly disadvantaged, rather than violent, vicious, or evil to the core. But we should have a realistic

conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. We must not exaggerate the distance between "us," the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

The nudity taboo retains great strength in the United States. It should not be confused with prudery. It is a taboo against being seen in the nude by strangers, not by one's intimates. Ours is a morally diverse populace and the nudity taboo is not of uniform strength across it. It is strongest among professing Christians, because of the historical antipathy of the Church to nudity; and as it happens the plaintiff alleges that his right "to practice Ch[r]istian modesty is being violated." The taboo is particularly strong when the stranger belongs to the opposite sex. There are radical feminists who regard "sex" as a social construction and the very concept of "the opposite sex," implying as it does the dichotomization of the "sexes" (the "genders," as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality. If prisoners have no rights, the reconceptualization of the prison as a site of progressive social engineering should give us no qualms. Animals have no right to wear clothing. Why prisoners, if they are no better than animals? There is no answer, if the premise is accepted. But it should be rejected, and if it is rejected, and the duty of a society that would like to think of itself as civilized to treat its prisoners humanely therefore acknowledged, then I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement and requires us to reverse the judgment of the district court throwing out this lawsuit.

I have been painting in broad strokes, and it is time to consider the particulars of this case and the state of the precedents. Albert Johnson, a pretrial detainee in the Cook County Jail, complains that female guards were allowed to watch his naked body while he showered and used the toilet. All we have is the complaint, which my colleagues want to dismiss without giving

Johnson a chance to develop the facts. The main issue raised by the appeal is whether a prisoner has an interest that the Constitution protects in hiding his naked body from guards of the opposite sex. A subordinate issue is whether, if so, the complaint—which Johnson drafted without assistance of counsel—sufficiently alleges deliberate as distinct from merely accidental exposure to survive dismissal.

The parties have confused the first issue by describing it as the extent of a prisoner's "right of privacy." They cannot be criticized too harshly for this. Countless cases, including our own *Canedy* v. *Boardman*, 16 F.3d 183 (7th Cir. 1994), have done the same thing. E.g., *Cornwell* v. *Dahlberg*, 963 F.2d 912, 916-17 (6th Cir. 1992); *Cookish* v. *Powell*, 945 F.2d 441, 446 (1st Cir. 1991) (per curiam); *Cumbey* v. *Meachum*, 684 F.2d 712 (10th Cir. 1982) (per curiam). The problem is that the term "right of privacy" bears meanings in law that are remote from its primary ordinary-language meaning, which happens to be the meaning that a suit of this sort invokes. One thing it means in law is the right to reproductive autonomy; another is a congeries of tort rights only one of which relates to the naked body; still another is the right to maintain the confidentiality of certain documents and conversations. Another and overlapping meaning is the set of interests protected by the Fourth Amendment, which prohibits unreasonable searches and seizures. That amendment has been held to be inapplicable to searches and seizures within prisons, *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984), and if applicable to jails housing pretrial detainees as distinct from convicted defendants—an unsettled question—is only tenuously so, *Bell* v. *Wolfish*, 441 U.S. 520, 556-57 (1979); *Brothers* v. *Klevenhagen*, 28 F.3d 452, 457 and n. 6 (5th Cir. 1994); *Valencia* v. *Wiggins*, 981 F.2d 1440 (5th Cir. 1993); *United States* v. *Willoughby*, 860 F.2d 15, 21 (2d Cir. 1988), though this may depend on the precise invasion complained of. A unanimous Supreme Court held in *Winston* v. *Lee*, 470 U.S. 753 (1985), that forcing a pretrial detainee to undergo surgery violates the Fourth Amendment. Cf. *Graham* v. *Connor*, 490 U.S. 386, 395 n. 10 (1989); *Hammer* v. *Gross*, 932 F.2d 842, 845 n. 1 (9th Cir. 1991) (en banc).

One part of the tort right of privacy is the right to prevent the publicizing of intimate facts, including the sight of the naked body.

Haynes v. *Alfred A. Knopf*, Inc., 8 F.3d 1222, 1229-30 (7th Cir. 1993). Even this right is not the basis of Johnson's suit. This is not a common law tort suit, and anyway the sight of his naked body was not "publicized" in the sense that this term bears in the law of torts. *United States* v. *Dorfman*, 690 F.2d 1230, 1234 (7th Cir. 1982); *Beverly* v. *Reinert*, 606 N.E.2d 621, 626 (Ill. App. 1992); *Restatement (Second) of Torts*, § 652D, comment a (1977).

Whalen v. *Roe*, 429 U.S. 589 (1977), while holding that a statute which required keeping a record of the names of people for whom physicians prescribed certain dangerous though lawful drugs did *not* invade any constitutional right of privacy, can be read to imply that the disclosure by or under the compulsion of the government of a person's medical records might invade a constitutional right of privacy, presumably a "substantive due process" right. "Disclosure" of the person's naked body might be argued to violate a cognate right to the concealment of the body. In this way a right to "privacy" in the rather literal sense in which it is invoked here might laboriously be extracted from constitutional precedent.

I consider this too tortuous and uncertain a route to follow in the quest for constitutional limitations on the infliction of humiliation on prison inmates. The Eighth Amendment forbids the federal government (and by an interpretation of the due process clause of the Fourteenth Amendment the states as well) to inflict cruel and unusual punishments. The due process clause has been interpreted to lay a similar prohibition on the infliction of cruel and unusual punishments on pretrial detainees who, like Johnson, not having been convicted, are not formally being "punished." *Bell* v. *Wolfish*, *supra*, 441 U.S. at 534-35; *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). I take it that purely psychological punishments can sometimes be deemed cruel and unusual. *Thomas* v. *Farley*, 31 F.3d 557, 559 (7th Cir. 1994); *Williams* v. *Boles*, 841 F.2d 181, 183 (7th Cir. 1988); *Northington* v. *Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992); *Jordan* v. *Gardner*, 986 F.2d 1521, 1530-31 (9th Cir. 1993) (en banc); cf. *McDonald* v. *Haskins*, 966 F.2d 292 (7th Cir. 1992); but see *Wisniewski* v. *Kennard*, 901 F.2d 1276 (5th Cir. 1990) (per curiam). The question is then whether exposing naked prisoners to guards of the opposite sex can ever be deemed one of

these cruel and unusual psychological punishments. The Sixth Circuit held in *Kent* v. *Johnson*, 821 F.2d 1220, 1227 (6th Cir. 1987), that it can be, and did not retract the holding in its order on rehearing, although it did retract any suggestion that cross-sex surveillance was unconstitutional per se. See *Id.* at 1229. My colleagues do not suggest that recasting Johnson's right of privacy claim as a claim under the Eighth Amendment can prejudice the state. The substance of the analysis is unchanged, and the parties in their briefs cite Eighth Amendment cases interchangeably with right of privacy cases.

I have no patience with the suggestion that Title VII of the Civil Right Act of 1964 forbids a prison or jail to impede, however slightly, the career opportunities of female guards by shielding naked male prisoners from their eyes. It is true that since the male prison population is vastly greater than the female, female guards would gain no corresponding advantage from being allowed to monopolize the surveillance of naked female prisoners. But Title VII cannot override the Constitution. There cannot be a right to inflict cruel and unusual punishments in order to secure a merely statutory entitlement to equal opportunities for women in the field of corrections. Although the equal protection clause of the Fourteenth Amendment has been held to protect women against sex discrimination by a state, *Trigg* v. *Fort Wayne Community Schools*, 766 F.2d 299, 302 (7th Cir. 1985); *Gray* v. *Lacke*, 885 F.2d 399, 414 (7th Cir. 1989); *Day* v. *Wayne County Board of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984), and the Cook County jail is an arm of the State of Illinois, the clause is not plausibly interpreted to license the infliction of cruel and unusual punishments. Just as it would not be a defense to a charge that the rack and thumbscrew are forms of cruel and unusual punishment to demonstrate that they are cheaper than imprisonment, so it is not a defense to the infliction of cruel and unusual psychological punishments that they advance women's career opportunities. And this is assuming that the interests of women would be advanced by a rule, implicit in my colleagues' decision, that gave no legal protection to female prisoners from the prying eyes of male guards; for Title VII and the equal protection clause are considered to protect men as well as women from sex discrimination.

This is not to say that exposing the naked male body to women's eyes constitutes cruel and unusual punishment in *all* circumstances. A male prisoner has no constitutional right to be treated by a male doctor. Cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 346 n. 5 (1977) (separate opinion); *Gargiul* v. *Tompkins*, 704 F.2d 661 (2d Cir. 1983), vacated on other grounds, 465 U.S. 1016 (1984). Men have long been attended in hospitals by female nurses, and latterly by female doctors as well. Even the "right of privacy" cases reject the suggestion that any time a female guard glimpses a naked male prisoner his rights have been invaded. See, e.g., *Michenfelder* v. *Sumner*, 860 F.2d 328, 335 (9th Cir. 1988); *Grummett* v. *Rushen*, 779 F.2d 491, 494-95 (9th Cir. 1985). Not only is the injury from an occasional glimpse slight; but in addition, as we can see when the "right of privacy" cases are reclassified under the proper constitutional rubrics, neither the Eighth Amendment nor the counterpart protections of pretrial detainees under the due process clauses extend to unintentional wrongs. *Farmer* v. *Brennan*, 114 S. Ct. 1970 (1994); *Wilson* v. *Seiter*, 501 U.S. 294, 300 (1991); *Murphy* v. *Walker*, 51 F.3d 714, 719 (7th Cir. 1995) (per curiam); *Ivey* v. *Harney*, 47 F.3d 181, 182 (7th Cir. 1995); *Duckworth* v. *Franzen*, 780 F.2d 645, 652 (7th Cir. 1985). Deliberately to place male prisoners under continuous visual surveillance by female guards, however, so that whenever the prisoner dresses or undresses, takes a shower, or uses the toilet, a woman is watching him, gives even my colleagues pause.

Ours is the intermediate case, where the prison or jail makes no effort, or a patently inadequate effort, to shield the male prisoners from the gaze of female guards when the prisoners are nude. No case holds that the surveillance of naked inmates by guards of the opposite case is lawful per se—not *Timm* v. *Gunter*, 917 F.2d 1093, 1101-02 (8th Cir. 1990), and not *Hudson* v. *Palmer*, *supra*, which held only that the right of privacy protected by the Fourth Amendment does not extend to prisoners, and not, as I shall show, *Bell* v. *Wolfish*. I infer from their discussion of *Torres* v. *Wisconsin Dept. of Health & Social Services*, 859 F.2d 1523 (7th Cir. 1988) (en banc), that my colleagues believe that female inmates have no constitutionally protected interest in not being seen in the nude by male guards. This surprises me.

Jordan v. *Gardner*, *supra*, is against this view, and no case supports it.

I have stated the interest at issue in this case as not being seen nude by a guard of the opposite sex, not only because most people are more embarrassed in that situation but also because the right of prisons and jails to maintain visual surveillance of potentially dangerous prisoners even when naked cannot be doubted in light of the serious security problems in many American prisons and jails today. What is in question is the right of prison officials to entrust the surveillance of naked prisoners to guards of the opposite sex from the prisoners. *Bell* v. *Wolfish*, *supra*, holds that pretrial detainees may be subjected to digital and visual inspection of the rectum for concealed weapons or other contraband. It does not follow that no constitutional issue is raised if the search is performed by a male guard on a female prisoner, or a female guard on a male prisoner; or if the search is visual rather than digital (it was both in *Bell* v. *Wolfish*); or if what is being watched is the prisoner's genitalia rather than the interior of his rectum. *Jordan* v. *Gardner*, *supra*, 986 F.2d at 1522, holds that "a policy that requires male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners," violates the Eighth Amendment. What Johnson alleges is worse, albeit with the sexes reversed.

The Eighth Amendment requires in my view that reasonable efforts be made to prevent frequent, deliberate, gratuitous exposure of nude prisoners of one sex to guards of the other sex. I doubt that any more precise statement of the proper constitutional test is feasible. It is precise enough to show that my colleagues indulge in hyperbole when they say that a decision for Johnson would mean that "female guards are shuffled off to back office jobs." They would not be, but that is not the most important point. The most important point is that sexual equality may not be pursued with no regard to competing interests, and with an eye blind to reality. The reality is that crime is gendered, and the gender is male. Stephen J. Schulhofer, "The Feminist Challenge in Criminal Law," 143 *University of Pennsylvania Law Review* 2151 (1995). The vast majority of criminals are male. The vast majority of their victims are male. The vast majority of police and correctional officers are male. These are inescapable realities in

the design of penal institutions and the validation of penal practices.

My colleagues toy with the idea that unless the *intentions* of the prison officials are in some sense punitive, there can be no liability under the cruel and unusual punishments clause, whatever the psychological impact of the prison's actions. There is support for this suggestion in language of some lower-court cases quoted in *Wilson* v. *Seiter*, *supra*, 501 U.S. at 300. But I do not think that that language was intended to override the distinction between motive and intent. The cruel and unusual punishments clause is not limited to sadistic inflictions, or, as my colleagues put it, to cases in which "the state has created risk or inflicted pain *pointlessly*" (my emphasis). The motives of prison officials and guards are in fact irrelevant. The relevant deliberateness is the deliberate adoption of a measure that constitutes cruel and unusual punishment. If prison officials use the thumbscrew and rack to discipline unruly prisoners, it is immaterial that their motive is not to punish but merely to maintain good order in the prison, or to save money. *Id.* at 301-02. The public beheadings of murderers by Saudi Arabia are, I imagine, motivated not by sadism but rather (to the extent that they have any secular motivation) by a belief that the public infliction of cruel punishments minimizes the crime rate. If prison officials deliberately expose male prisoners to the gaze of female guards, or female prisoners to the gaze of male guards, it should be irrelevant that the motive of the officials may have been merely to avoid sorting custodial tasks by gender.

The distinction between motive and intent runs all through the law. If someone plants a bomb in an airplane, his intent in the eyes of the law is to kill, though his motive might be to intimidate political opponents, obtain publicity, demonstrate skill with explosives, collect life insurance on a passenger, or distract the police from his other criminal activities. *United States* v. *McAnally*, 666 F.2d 1116, 1119 (7th Cir. 1981). More to the point, the distinction that I am emphasizing between motive and intent is implicit in the standard of "deliberate indifference" which the courts use to determine whether the state of mind required by the Eighth Amendment is present. See, e.g., *Wilson* v. *Seiter*, *supra*, 501 U.S. at 303; *Ivey* v. *Harney*, *supra*, 47 F.3d at 182. That standard is satisfied by proof of "actual knowledge of impending

harm easily preventable," *Duckworth* v. *Franzen*, *supra*, 780 F.2d at 653—a formulation that dispenses entirely with any investigation of motive. If prison officials know that they are subjecting male prisoners to gratuitous humiliation, the infliction is deliberate, even if the officials are not actuated by any punitive purpose and are not even certain that humiliation will result. "[A]n eighth amendment complainant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer* v. *Brennan*, *supra*, 114 S. Ct. at 1981. The principal application of the standard of deliberate indifference is to cases of medical care. If prison officials, knowing that an inmate is seriously ill, refuse to provide him with any treatment, the fact that their motive is not to punish him but merely to save time and money is not a defense to his Eighth Amendment claim. *Estelle* v. *Gamble*, 429 U.S. 97 (1976); see also *Wilson* v. *Seiter*, *supra*, 501 U.S. at 302.

I turn now to the question whether the complaint states a claim for the infringement of the right that I have sketched. The defendants appeal to the principle repeated in a number of recent cases that although the Federal Rules of Civil Procedure require only a short and plain statement of the plaintiff's claim, a plaintiff who decides to write a prolix complaint risks pleading himself out of court by alleging facts (which bind him as judicial admissions) that negate an element of his claim. E.g., *Warzon* v. *Drew*, 60 F.3d 1234, 1239-40 (7th Cir. 1995); *Esmail* v. *Macrane*, 53 F.3d 176, 179 (7th Cir. 1995). The defendants fasten on the allegation in the complaint that there was a "sheet" between the bathroom (containing both showers and toilets) used by Johnson and other male inmates and the area in which the guards are stationed. In fact what Johnson alleged was that

> when a female correctional officer is assigned to work a dorm it is her duty and responsibility to make counts, also to constantly supervise all inmates in the dorms, making periodic, unannounced spot checks of inmates in their living area, and s[u]rveying in the remainder of the area such as the general toilet, and shower facilities, which is in an open unobstructed area, except by a thin sheet that can be seen through.

This can fairly be read to allege that female guards assigned to Johnson's dorm are responsible for maintaining visual surveillance of the bathroom, which they are able to do because it is separated from the part of the dorm in which the guards are stationed by a transparent "sheet," perhaps a kind of shower curtain. So read, the complaint is consistent with a form of cross-sex surveillance sufficiently frequent, gratuitous, and deliberate to withstand dismissal on the pleadings. A further factual inquiry is necessary to determine whether Johnson's constitutional rights have been violated.

My colleagues say that we must respect "the hard choices made by prison administrators." I agree. There is no basis in the record, however, for supposing that such a choice was made here, or for believing that an effort to limit cross-sex surveillance would involve an inefficient use of staff—"featherbedding," as my colleagues put it. There is no record. The case was dismissed on the complaint. We do not know whether the Cook County Jail cannot afford a thicker sheet or, more to the point, cannot feasibly confine the surveillance of naked male prisoners to male guards and naked female prisoners to female guards. We do not even know what crime Johnson is charged with. My colleagues urge deference to prison administrators, but at the same time speak confidently about the costs of redeploying staff to protect Johnson's rights. It would be nice to know a little more about the facts before making a judgment that condones barbarism.

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 29, 1996.

Before

Hon. RICHARD A. POSNER, Chief Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

ALBERT JOHNSON, *Plaintiff-Appellant*,	)	Appeal from the United States District Court for the Northern
No. 93-3753 v.	)	District of Illinois, Eastern Division.
RICHARD J. PHELAN, ET AL., *Defendants-Appellees*.	)	No. 92 C 1943 James H. Alesia, *Judge*

ORDER

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on November 21, 1995. A judge in regular active service has requested a vote on the suggestion of rehearing en banc,* which failed to reach a majority,** and a

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* Judge Flaum and Judge Rovner did not participate in the decision of this case.

** Chief Judge Posner and Judges Cummings, Ripple and Evans voted for rehearing en banc.

majority*** of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

*** Chief Judge Posner voted to grant rehearing.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALBERT JOHNSON,	)	
	)	
Plaintiff,	)	
	)	No. 92 C 1943
v.	)	Hon. James H. Alesia
	)	
RICHARD J. PHELAN, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Albert Johnson, brought this complaint seeking injunctive relief and damages from five Cook County officials. Johnson, who was confined to the Cook County Jail at the time his cause of action accrued, claims defendants violated his right to personal privacy. This alleged invasion of Johnson's privacy occurred in two ways. First, Johnson claims the bathroom for male pretrial detainees in the Cook County Criminal Courthouse was equipped with a faulty partition that enabled female prison guards and pretrial detainees to observe Johnson going to the bathroom on those occasions when he had to be in the Courthouse for court proceedings. Second, Johnson claims that, in the tier where he was housed in the Cook County Jail, female correctional officers were able to observe inmates in the shower.

Each of the five defendants in this case has filed a separate motion to dismiss the plaintiff's pro se complaint. Since all of the motions are essentially identical, the court will deal with them in one opinion. The defendants claim, first, that they cannot be held liable in their individual capacities because none of them were involved in or had knowledge of the incidents described in the

complaint; second, that they cannot be held liable in their official capacities because Johnson has not alleged that the challenged conditions were a result of an official policy or custom of the County; and, third, that Johnson has not shown that his limited right to privacy has been violated.

Johnson has responded to the motions filed by defendants Sheahan, Fairman, Phelan, and Charnogorsky. Although the docket reflects no response to defendant Estrada's motion, the court finds that Estrada stands in the same shoes as the other defendants, and will accordingly resolve his motion along with the others. Johnson claims that he sent a letter to Richard Phelan, the Chairman of the Cook County Board, complaining about the bathroom in the Courthouse. He further claims that Charnogorsky, identified as the Cook County Commissioner for Buildings and Zoning, approved the design of the faulty bathroom partition, and thus had knowledge of the conditions challenged in the complaint. In his response to Michael Sheahan and J.W. Fairman's motions to dismiss, Johnson contends that he filed an institutional grievance over the showers in Cook County Jail, but received no response.

Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a claim may only be dismissed if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989) (quoting *Hishon* v. *King & Spaulding*, 467 U.S. 69, 73 (1984)). For purposes of a 12(b)(6) motion, the court must accept all well-pleaded facts as true, and any reasonable inferences drawn from them must be viewed in the light most favorable to the plaintiff. *Ellsworth* v. *City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

Discussion

This case involves two separate incidents which must be analyzed separately. Johnson does not contend that Sheahan or Fairman or Estrada had any responsibility for the bathroom in the Courthouse. Likewise, Johnson does not seek to hold Phelan or Charnogorsky responsible for the showers in the Jail. Therefore, the court will discuss each incident independently of the other.

The Courthouse Bathroom

With respect to the right to privacy, prisoners' rights are extremely limited. In fact, to a certain extent, imprisonment extinguishes the right to privacy. See *Bell* v. *Wolfish*, 441 U.S. 520, 537 (1979) ("[l]oss of freedom of choice and privacy are inherent incidents of confinement"). Nonetheless, prisoners do retain some shred of bodily integrity. See *Hudson* v. *Palmer*, 468 U.S. 517, 528 (1983) (maliciously motivated searches ... of even the most hardened criminals cannot be tolerated by a civilized society"). Of course, Johnson at the time his cause of action accrued was a pretrial detainee and not a convicted criminal. With respect to personal privacy, however, Johnson's status is irrelevant. Both pretrial detainees and convicted prisoners have a legitimate expectation of privacy in the execution of certain basic bodily functions. See e.g. *Michenfelder* v. *Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) ("[s]hielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex is impelled by elementary self-respect and personal dignity."); *Tucker* v. *Dickey*, 613 F. Supp. 1124, 1130 (D.C. Wis. 1985) (prisoner had privacy interest against being forced to urinate in the presence of guards in order to comply with drug test); *Doe* v. *Calumet City, Illinois*, 754 F. Supp. 1211, 1218 (N.D. Ill. 1990) ("[d]eeply imbedded in our culture ... is the belief that people have a reasonable expectation not to be ... observed unclothed ... by others.").

Ordinarily, a prisoner's right to personal privacy must be balanced against the institution's legitimate interest in maintaining security. *Hudson* v. *Palmer*, 468 U.S. at 527-28; *Bell* v. *Wolfish*, 441 U.S. at 559. In the instant case, however, defendants have advanced no security justification for the challenged condition in the Courthouse. It seems that the problem was simply caused by a faulty partition. The question that remains is whether defendants Phelan and Charnogorsky can be held liable for the incidental infringement of Johnson's right to privacy.

Phelan and Charnogorsky are sued in both their individual and official capacities. It is well settled that an individual can be held liable under § 1983 only if "he caused or participated in an alleged constitutional deprivation." See *Rascon* v. *Hardiman*, 803

F.2d 269, 273 (7th Cir. 1986) (*quoting Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983)). An official's direct participation in the alleged deprivation, however, need not be alleged. As the court stated in *Smith* v. *Rowe*, 761 F.2d 360, 369 (7th Cir. 1985):

> An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent.

The only evidence that Johnson offers to show that Phelan and Charnogorsky knew about the condition of the Courthouse bathroom is a letter that Johnson wrote to Phelan complaining about the faulty partition. Nothing indicates that Charnogorsky was ever informed about or had any knowledge of the challenged condition. Accordingly, Charnogorsky cannot be held liable in his individual capacity. Similarly, although Johnson informed Phelan by letter, the President of the Cook County Board can hardly be expected to respond immediately to every complaint about a faulty bathroom door. See *Crowder* v. *Lash*, 687 F.2d 996, 1005-06 (7th Cir. 1982). The court thus finds the letter from Johnson to Phelan insufficient to establish personal responsibility on the part of Phelan. Accordingly, Phelan and Charnogorsky's motion to dismiss is granted as to all claims against them in their individual capacities.

Johnson also sues Phelan and Charnogorsky in their official capacities. A suit against a governmental officer in his official capacity is actually a suit against the governmental entity for which the officer works. *Kentucky* v. *Graham*, 473 U.S. 159, 164 (1985). Governmental entities, such as Cook County, cannot be held liable unless an official policy or custom caused the constitutional violation asserted in the complaint. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978); *Thompson* v. *Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) *cert. denied*, 110 S.Ct. 2167 (1990). Nothing in the record of this case indicates that the County maintained a policy of failing to repair faulty bathroom partitions in County buildings. In order to permit an inference that a governmental entity's failure to do something

amounts to an official policy or custom which, if the cause of a constitutional violation, is actionable under § 1983, a plaintiff must allege a course of events or circumstances which demonstrates deliberate indifference to or tacit authorization of the offensive conduct. See e.g. *Hossman* v. *Blunk*, 784 F.2d 793 (7th Cir. 1986). As discussed above, there is no evidence that any high-ranking County officials even knew about the faulty partition. Accordingly, the court grants Phelan and Charnogorsky's motion to dismiss as to any official capacity claims.

The Showers in the Cook County Jail

Johnson claims that in one tier of the Cook County Jail it is possible for female correctional officers to observe inmates while in the shower. As discussed above, prisoners and pretrial detainees have a legitimate privacy interest in shielding their unclothed bodies from view by members of the opposite sex. Two competing interests, however, must be balanced against the inmates' legitimate privacy interest. The first and most obvious interest is security. Shower areas present a particularly ripe opportunity for assaults to take place. See e.g. *McGill* v. *Duckworth*, 944 F.2d 344 (7th Cir. 1991). Thus, jail officials have a legitimate interest in being able to observe inmates in the shower.

Johnson does not claim that female correctional officers are assigned to observe inmates while showering. Any observation by female guards appears to be incidental and inadvertent. In cases addressing the incidental observation of unclothed male inmates by female correctional officers, courts have found that the rights of women to equal job opportunities in the correctional field generally outweigh the inmates' reduced privacy rights. See *Michenfelder* v. *Sumner*, 860 F.2d at 334 ("assigned positions of female guards that require only infrequent and casual observation ... and that are reasonably related to prison needs are not so degrading as to warrant court interference."); *Smith* v. *Chrans*, 629 F. Supp. 606, 611 (C.D. Ill. 1986) (where sightings by female staff of male inmates in various stages of undress were occasional and at most inadvertent, inmates' residual right of privacy was not infringed); *Bagley* v. *Watson*, 579 F. Supp. 1099 (D.C. Oregon 1983) ("the preference of some male inmates for male guards, and the indignity perceived by some male inmates as a result of having

women guards perform the kinds of searches and observations at issue in this case ... do not justify discrimination against women in employment ... .").

Since Jail officials have a legitimate interest in maintaining some level of observation of inmates while in the showers, and since the occasional viewing of male inmates by female correctional officers appears to be at most infrequent and incidental to their legitimate presence in the institution, the court finds that Johnson has failed to state a claim that his privacy rights were violated in this instance. Accordingly, the court grants defendants Sheahan, Fairman, and Estrada's motions to dismiss.

Conclusion

Since Johnson has failed to state a claim against any of the defendants in this case, the court grants defendants Phelan, Charnogorsky, Sheahan, Fairman, and Estrada's motions to dismiss. This case is hereby dismissed with prejudice. Any pending motions in this case are denied as moot.

ENTER:

JAMES H. ALESIA

Judge, United States District Court

Dated: *SEP 28 1993*